

No. 83-1635

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In the Supreme Court of the United States

OCTOBER TERM, 1983

JEROME S. WAGSHAL, PETITIONER

v.

CROZER-CHESTER MEDICAL CENTER, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT*

**MEMORANDUM FOR THE FEDERAL RESPONDENT
IN OPPOSITION**

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Petitioner seeks review of the court of appeals' affirmation of the district court's decision not to award attorney's fees against members of a class represented by petitioner in litigation that terminated approximately ten years ago.

1. Petitioner represented the successful litigants in three suits brought in the United States District Court for the District of Columbia against the Secretary of Health, Education, and Welfare¹ to compel the Secretary to make available approximately \$600 million in federal funds appropriated by Congress for public health programs.² These

¹The Department of Health, Education, and Welfare has been redesignated the Department of Health and Human Services. See 20 U.S.C. 3508.

²The cases are: *National Council of Community Mental Health Centers, Inc. v. Weinberger*, 361 F. Supp. 897 (D.D.C. 1973); *National Association of Regional Medical Programs v. Weinberger*, Civ. No. 1807-73 (D.D.C. Feb. 7, 1974); *National Association for Mental Health, Inc. v. Weinberger*, Civ. No. 1812-73 (D.D.C. Sept. 4, 1975).

funds had been impounded by the Secretary at the direction of the President. On cross-motions for summary judgment, the district court ruled that implementation of the programs was mandatory, and the Secretary accordingly allocated the appropriate sums to eligible grantees to be obligated for approved program purposes. No appeal was taken by the government in any of the three cases.

Following the conclusion of the litigation on the merits, petitioner initiated ancillary proceedings in the district court to recover attorney's fees³ above and beyond the retainer fees that had been paid him by his clients.⁴ In each case petitioner requested the court to award substantial attorney's fees against the plaintiff class members individually or, alternatively, against the Secretary to be paid from

³The attorney's fee cases arising from the impoundment litigation are: *National Council of Community Mental Health Centers, Inc. v. Weinberger*, 387 F. Supp. 991 (D.D.C. 1974), rev'd, 546 F.2d 1003 (D.C. Cir. 1976), cert. denied, 431 U.S. 954 (1977); *National Association of Regional Medical Programs v. Weinberger*, 396 F. Supp. 842 (D.D.C. 1975), rev'd, 551 F.2d 340 (D.C. Cir. 1976), cert. denied, 431 U.S. 954 (1977); *National Association for Mental Health, Inc. v. Weinberger*, 68 F.R.D. 387 (D.D.C. 1975), rev'd, 561 F.2d 1021 (D.C. Cir. 1977).

⁴In *National Council of Community Mental Health Centers* the retainer was \$13,216; in *National Association of Regional Medical Programs* the retainer was \$21,070; and in *National Association for Mental Health* the retainer was \$27,580.10. In addition, a settlement in *National Association of Regional Medical Programs* produced \$84,430 for petitioner. See Pet. App. 6a n.2.

The retainer agreements provided for a minimum \$35 hourly fee and expenses. The representatives of the plaintiff classes who negotiated the fee arrangements were apprised by petitioner that in the event the litigation was successful an application would be made for an additional fee to be fixed by the court. However, not all class members were aware of these arrangements. See *National Council of Community Mental Health Centers*, 387 F. Supp. at 993 n.1; *National Association of Regional Medical Programs*, 396 F. Supp. at 847. Moreover, there was nothing in the complaints filed in these three cases to apprise the plaintiff class members that additional attorney's fees would be sought from the court.

the grant funds made available as a result of the litigation. The government opposed any award of attorney's fees from federal grant funds on the ground that such an award was prohibited by 28 U.S.C. (1976 ed.) 2412, which barred the payment of attorney's fees "[e]xcept as otherwise specifically provided by statute * * * in any civil action brought by or against the United States or any agency or official of the United States acting in his official capacity * * *."⁵ The government did not oppose petitioner's claims to attorney's fees from the plaintiff class members, provided that no federal grant funds were utilized for the payment of fees.

The district court initially awarded attorney's fees to be paid to petitioner from unexpended grant funds, but the court of appeals reversed (see note 3, *supra*). The court of appeals held that federal grant funds could not lawfully be used for the payment of attorney's fees without statutory authorization in view of 28 U.S.C. (1976 ed.) 2412 and this Court's decision in *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975). Additionally, the court of appeals determined that the district court lacked jurisdiction to award attorney's fees against the individual class members from non-grant money, since they had no notice of petitioner's claim for attorney's fees in excess of the retainer agreements and were not adequately represented in the fee proceedings. Petitioner unsuccessfully sought rehearing en banc in the court of appeals, and this Court denied certiorari.⁶

⁵The statutes under which the three impoundment cases arose make no provision for the payment of attorney's fees.

⁶In addition, in 1977 a private bill was introduced in the House of Representatives "for the relief of Jerome S. Wagshal." H.R. 9800, 95th Cong., 1st Sess. This bill would have awarded a \$307,000 attorney's fee to petitioner for securing the release of the impounded funds. No action was taken on this bill by the 95th Congress, and the bill was never reintroduced in any subsequent Congress.

Following these adverse decisions, petitioner made further efforts to obtain an award of attorney's fees from the class members in the original impoundment cases. The district court held that it lacked *in personam* jurisdiction over the unnamed class members in those cases and therefore that it could not enter attorney's fees against them incident to that litigation. In addition, the court declined to award fees in petitioner's separate suit against the class members, ruling that the two named defendants were not adequate class representatives for purposes of the fee issue, that there was no *in personam* jurisdiction over the unnamed class members, and that subject matter jurisdiction was lacking with respect to the two named defendants because of an insufficient amount in controversy under 28 U.S.C. 1332. Pet. App. 21a-31a. The court of appeals affirmed (*id.* at 3a-20a).

3. Because petitioner no longer seeks attorney's fees from federal grant funds, the Secretary has no financial stake in this litigation and took no position on the merits in the court of appeals (see Gov't Br. 2, 6).⁷ However, for the reasons stated in the opinion of the court of appeals, we believe that the decision below is correct and does not warrant further review.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

JUNE 1984

⁷The Secretary is formally a party here only because she was a party in the original impoundment suits.

